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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

JUN 2 1998

In the Matter of	)	
	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56 RM-9101

MOTION TO ACCEPT LATE-FILED COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST"), pursuant to Section 1.41 of the Rules of the Federal Communications Commission ("Commission"), hereby requests that the Commission accept its late-filed Comments (attached hereto) in the above-captioned proceeding. The Comments are one day late and respond to the Notice of Proposed Rulemaking, wherein the FCC addresses performance measurements and reporting requirements regarding operations support systems, interconnection and operator and directory assistance services.[1] U S WEST provides the following explanation.

U S WEST prepared its Comments with the expectation that they would be filed on June 1, 1998. Because of unexpected computer and last-minute technical production problems, U S WEST was not able to file its Comments in a timely

[1] See In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, CC Docket No. 98-56 and RM-9101, Notice of Proposed Rulemaking, FCC 98-72, rel. Apr. 17, 1998 ("NPRM").

manner. U S WEST believes that its Comments, and the attached Appendix of Dr. Michael Carnall, which addresses the statistical sampling issues raised by the Commission in Appendix B to the NPRM, would be a valuable addition to the record in this proceeding.

U S WEST does not believe that any party would be prejudiced by the acceptance of its late-filed Comments. Reply Comments are not due in this proceeding until June 22, 1998. Therefore, U S WEST requests that its Comments be accepted one-day late and be made part of the record. U S WEST regrets any inconvenience to the Commission and parties to this proceeding caused by its late-filed Comments.

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June 2, 1998

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COMMENTS OF U S WEST COMMUNICATIONS, INC.

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COMMENTS OF U S WEST COMMUNICATIONS, INC.

I. INTRODUCTION AND SUMMARY: WHILE THE INTENTIONS BEHIND THE INSTANT RULEMAKING ARE WELL MEANING, THE COMMISSION SHOULD TERMINATE THE CURRENT RULEMAKING.

It is clear the Federal Communications Commission ("FCC" or "Commission") believes that the current NPRM[1] is capable of bringing some level of "uniformity" to what sometimes might appear to be a chaotic situation with respect to performance measurements associated with Operations Support Systems ("OSS") access and interconnection.[2] Through the NPRM, the Commission seeks to bring some method

[1] See In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, CC Docket No. 98-56 and RM-9101, Notice of Proposed Rulemaking, FCC 98-72, rel. Apr. 17, 1998 ("NPRM").

[2] The Commission discussion of performance measurements with respect to OSS access and interconnection is often quite confusing. As a conceptual matter, a "measure" of "performance" relates to the service offering of an incumbent local exchange carrier ("ILEC") – either the provision of interconnection, unbundled network elements ("UNE") or resold services. With respect to the provision of these

to the putative madness in a manner that it believes might operate to minimize regulatory oversight.[3] However well-intentioned the Commission's objectives, the Commission should terminate the current proceeding. From both a legal and policy perspective, the objectives of the Commission are confused and confusing. Furthermore, the regulatory oversight the Commission seeks to minimize is not well articulated. Indeed, any federal regulatory insinuation in this matter is certain to only further add contention and litigation regarding performance measurements.

For the following reasons, U S WEST Communications, Inc. ("U S WEST") opposes the continuation of this proceeding. **First**, the NPRM fails to accord private parties and contractual negotiations the deference accorded them by the

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services, some involve business practices and personnel, while others do not. Thus, the "performance" being "measured" depends on the service being addressed.

For example, while certain UNEs might involve personnel (such as Operator Services ("OS") and Directory Assistance ("DA")), others do not. Thus, the Commission's description of OSSs as "the computer systems, databases, and personnel that incumbent carriers rely upon to discharge many internal functions necessary to provide service to their customers" (NPRM para. 9) is incorrect. OSSs do not involve personnel. The only "performance measurements" relevant to OSSs involve computer-type measurements, i.e., computer response time and system availability. It is most often with respect to interconnection activities that business processes involving personnel more often come into play. In this context, there might well be performance measurements associated with business processes that are not relevant in the measurement of OSS performance.

The Commission's approach confuses the already complex issues associated with analyses around performance measurements. In order not to extend the confusion, when U S WEST discusses "performance measurements" throughout the remainder of this filing, it should be understood that we use the term generally and do not concede that any particular measurement is appropriately associated with any particular service, nor that measurement of business processes is relevant to the performance of any particular referenced service.

Telecommunications Act of 1996 and articulated judicial precedent.[4] Terms of interconnection and access to OSSs, OS and DA – all UNEs -- are first and foremost to be negotiated by interested parties. While initial contract negotiations (those undertaken in 1996) were focused on more fundamental and basic matters than performance measurements, more recent negotiations have found the matter of performance measurements to be an integral part of the negotiations. For reasons outlined in more detail below, the contract negotiation process is the best forum and process for resolving the matters addressed in the NPRM.

Second, while the NPRM makes clear a Commission intention to craft a collaborative process with the states around the issues covered by the NPRM, the proposed collaboration is grounded on a fundamental misconstruction of the guidance requested by the National Regulatory Utilities Commissioners ("NARUC") in their 1997 Resolution. As demonstrated below, the NARUC asked guidance similar to that which the Commission proposes only after other, less insinuatory, measures were investigated and initiated.

Third, the Commission's proposal elevates the matter of contention around the matter of performance measurements to an inappropriate level. Rather than allowing contracting parties to work through issues associated with whether a particular performance measurement is appropriate in the first instance (either because a cost/benefit analysis cannot prove in the need for the measurement or

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[3] Id. paras. 14, 16.

[4] See Iowa Utilities Bd. v. F.C.C., 120 F.3d 753, 793 n.9, 800-01 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 879 (Jan. 26, 1998) (Nos. 97-826, et al.).

because the measurement is likely to produce unduly ambigous results), the Commission's proposal includes a number of proposed measurements where contention about the results is certain to occur. It is not good law or good policy to elevate contention around performance measurement results when the matter can be resolved at the predicate stage, i.e., negotiations around whether the measure is appropriate.

Fourth, the framework of the Commission's proposal is defective. It strikes a reader of the NPRM, and a student of regulatory practice, that the current NPRM is essentially an oxymoron. The hortatory non-legally binding "guidance" the Commission proposes is at odds with an immediate rulemaking proceeding and simply operates to create industry confusion. State commissions and carriers alike will be faced with further procedural conundrums around just what the purpose is of federal "rules" in this area; whether it is possible to meet contractual obligations and abide by state mediation/arbitration Orders and still "violate" federal rules (or guidance); what significance a reviewing court should give to the federal guidance, and so on. The confusion is obvious, as is the likelihood that federally-promulgated rules in this area in any framework and at any time will undoubtedly lead to judicial challenge.

Furthermore, procedural due process fairness suggests that the Commission would be required to take some additional formal regulatory action to move from "guidelines" to rules any time in the future, if and when it determined to go down that road. Given that some formal action would need be taken in the future, the Commission should vacate its currently detailed proposals and move to something

more "principled" in nature.

For all these reasons, as U S WEST demonstrates in more detail below, the Commission should terminate its current rulemaking proceeding. Should it determine sometime in the future that formal rules in this area are necessary, it can reinstitute a rulemaking, analyzing how such rules are then to be incorporated into the fabric of the 1996 Act.

II. CONTRACTUAL NEGOTIATIONS FORM THE BEST VEHICLE TO DEFINE PERFORMANCE MEASUREMENTS AND REPORTING REQUIREMENTS.

A. As Contemplated By The 1996 Act, Performance Measurement Issues Should Be Left To Private Contractual Negotiations, In The First Instance.

In 1997, U S WEST filed an Opposition to the Petition for Expedited Rulemaking filed by LCI International Telecom Corp. and Competitive Telecommunications Association.[5] There we argued that contract negotiations and state regulatory oversight were sufficient to assure the type of nondiscrimination required by the Commission's First Report and Order.[6] Nothing has changed in this regard. Indeed, quite the contrary.

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[5] Petition for Expedited Rulemaking, filed May 30, 1997. And see Public Notice, Comments Requested on Petition for Expedited Rulemaking to Establish Reporting Requirements and Performance and Technical Standards For Operations Support Systems, RM 9101, DA 97-1211, rel. June 10, 1997. Opposition of U S WEST, Inc., filed July 10, 1997. See also NPRM at paras. 19-20, 23 (addressing the later refinements to the LCI Petition).

[6] See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd. 15499 (1996) ("First Report and Order"), *rev'd in part,* Iowa Utilities Bd. v.

Since 1997, U S WEST's activities in the area of negotiating performance measurements have increased. Original negotiations were often quite contentious and burdened by discussions of performance standards versus performance measurements.[7] However, the more recent past has shown significant movement in this area.

In approximately September of 1997, certain CLECs began advocating use of the Local Competition Users Group ("LCUG") framework, upon which the Commission's own proposed rules are based, in part.[8] As the LCUG framework became clarified over time to make clear its focus on actual LEC performance and the measurement of that performance (as opposed to performance standards and individual LEC comparisons with that standard), the model became more acceptable to U S WEST as one designed to and potentially useful in assessing discrimination.

Thus, in March of this year, U S WEST agreed to work with CLECs towards adoption of performance measurements based upon the LCUG framework. Efforts to refine and modify the LCUG framework with many CLECs in combined regional negotiations, as well as state-specific negotiations, have proven successful, from

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F.C.C., 120 F.3rd 753 (8th Cir. 1997), *cert. granted,* 118 S. Ct. 879 (Jan. 26, 1998) (Nos. 97-826, et al.).

[7] Performance measurements collect data regarding actual results, not some predetermined performance level, benchmark, standard or objective. The Commission notes the differences between performance measurements and standards in various places in the NPRM. See, e.g., NPRM paras. 3, 17-18, 125.

[8] Id. para. 20.

U S WEST's perspective.[9] Moreover, while there increasingly exists general agreement towards use of the LCUG framework, it has been and remains U S WEST's experience (confirming the observations of Commissioner Harold Furchtgott-Roth) that each competitive carrier has its own view of what is necessary for it to determine if it is being provided with non-discriminatory service.[10]

Like Commission Furchtgott-Roth, U S WEST agrees that "[o]ne of the many great advantages of contracts over regulation is that, with contracts, individuals can obtain the specific terms and conditions to meet their specific needs rather than rely on the few generally available offerings for terms and conditions under regulation."[11] Contract negotiations have, in fact, allowed carriers to ask for (and often receive) the particular kinds of measurements and reports that best suit their needs.[12]

Those same negotiations have allowed U S WEST to "push back" against providing measurements that it (a) currently does not measure, (b) believes are not required under the nondiscrimination obligations of Sections 251 or 252 or the

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[9] Clearly, when a party involved in a negotiation or a state-controlled arbitration or mediation loses an issue on which it believes strongly, it will not generally characterize the result as "successful." By "successful," U S WEST means that the current processes, including the avenue of judicial review, remain workable and that federal intervention is not necessary at this time.

[10] Dissenting Statement of Commissioner Harold Furchtgott-Roth, Apr. 16, 1998 ("Dissenting Statement of Furchtgott-Roth") at 1 ("individuals can obtain the specific terms and conditions to meet their specific needs").

[11] Id.

Commission's rules, (c) believes will be costly to institute with perhaps marginal benefit, and (d) believes would only increase contention regarding performance because of ambiguous conclusions that might be drawn from the information.[13] Given the balancing of interests allowed in the negotiation process, U S WEST believes -- like Commissioner Furchtgott-Roth -- that the best resolution of the issues considered in the NPRM "are based not on regulatory constructs but upon contracts."[14]

The current contract/state review process – as stated by Commissioner Furchtgott-Roth – while "not entirely free from regulation, [has not proven] so rigid in structure that [it] cannot include provisions of interest to the contract parties."[15] Given the clear legislative preference evidenced in the 1996 Act for the contractual negotiation process and what should be continued movement by the Commission toward deregulation not more regulation,[16] U S WEST urges the termination of this

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[12] Indeed, as discussed further below, not all carriers actually care about whether U S WEST's performance is measured or contract for reports of such measurement.

[13] This latter item is addressed more fully below.

[14] Dissenting Statement of Furchtgott-Roth at 1. See also Comments of Kathryn C. Brown, Transcript at 65, Common Carrier Bureau Operations Support Systems Forum, May 28, 1997 ("optimally the relationship between the carriers should be a contractual one. We have to move . . . away from a regulatory prescriptive approach to a contractual approach.").

[15] Dissenting Statement of Furchtgott-Roth at 2.

[16] While "guidelines" are certainly less regulatory than "rules," it is surprising – in light of some of Commissioner Powell's recent remarks -- that he would have been as instrumental as he appears to have been with respect to the framework of the current NPRM. See Separate Statement of Commissioner Susan Ness (expressing her gratitude to Commissioner Powell for his leadership with respect to the "form" of the Commission's proposals, i.e., guidance *versus* rules). Commissioner Powell has been calling for Commission policies that would allow for more efficient

rulemaking proceeding. Performance measurements should be defined and reported pursuant to non-federal regulatory processes.

B. Contention Associated With Proposed Measurements And The Reporting Of Information Is Better Addressed In Contract Negotiations And State-Review Level.

As Commissioner Furchtgott-Roth notes, the Commission's proposed NPRM is significant in its level of detail.[17] And, as is obvious throughout the NPRM, the Commission often seeks to "split the baby" as it attempts to balance the numerous aspects of the LCI/LCUG proposal with something less disaggregated.[18]

Both the level of detail, as well as the compromised nature of the proposal, demonstrates the Commission is attempting to replicate – to some extent – the contract negotiation process. However, its attempts – despite their well-meaning nature – must ultimately fail.

There are potentially hundreds of possible suggestions and permutations to choose from regarding interconnection and service (i.e., resale and UNE) performance measurements. Given the number of systems involved and the variety of interested participants, performance measurement and reporting could – quite literally – be structured in any number of ways, with each particular "structure"

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regulation by shifting resources from "prospective regulation to enforcement." See e.g., New Regulatory Thinking, Speech of Commissioner Michael Powell (as prepared for delivery) before the 42nd Annual MSTV Membership Meeting, Las Vegas, Nevada, Apr. 6, 1998. The detailed, prescriptive nature of the NPRM seems at odds with Commissioner Powell's professed preference.

[17] See Dissenting Statement of Furchtgott-Roth at 4. See also Separate Statement of Commissioner Michael K. Powell, Apr. 17, 1998 at 2.

[18] See, e.g., NPRM para. 47.

measuring things critical to a determination of non-discrimination and each structure measuring less marginal factors, or neglecting to measure an item at all.[19]

For that reason, the "structure" itself is best left to private party contractual agreements. It can be assumed that each party to the negotiation will attempt to secure for itself what it believes is the best structure possible. As a necessary part of the negotiation, discussions will occur, and accommodations and compromises will be made. Only if parties cannot agree will the aid of regulatory authority become necessary. And, at that point, the regulatory authority will often be more focused, not seeking to establish an overall "model" or "structure" but rather addressing specifically-disputed issues between the involved parties that quite often will be at the margin of the "performance measurement" model.

While it is clear that issues "at the margin" might well be significant to each side to a negotiation, often they will be at the margin because the amount of contention associated with the measurement and the concomitant reporting will be

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[19] An example might demonstrate the point more directly. In the pre-ordering context, the Commission proposes a measurement around "Due Date Reservation." NPRM, Appendix A, A-1. This is not a term U S WEST uses with respect our OSS fields or the measurements we currently engage in. On U S WEST's LSR, a CLEC has the opportunity to input a "desired due date." If no appointment for the service installation is required, that field would be filled in either with the standard interval for the particular product (which U S WEST provides to the CLEC for their information) or a later date, if that is what the CLEC's customer desired. If an appointment is necessary for the service installation, the "desired due date" field provides information on the next two weeks of available appointments, from which the CLEC would choose a specific date. The specific date would now occupy that field. Only the second of the options (i.e., a specific appointment date) correlates well with the Commission's use of the term "reservation." However, nothing suggests that U S WEST's methodology adversely impacts "effective and efficient communication" between U S WEST and the CLEC.

a matter of some significant concern to one side or the other. That contention might stem from the fact that (a) the current information is not measured and (1) a legal issue might exist as to the propriety of the requested measure or (2) the cost of creating the measurement capability might be high; (b) the information can be measured but the value of measuring it is unclear either because (1) it will be costly to create, (2) it is not generally desired by others, or (3) creating the measurement and reporting on it will itself lead to future contention.

The latter is a matter worth more comment. While a LEC might well be able to create a measurement, if the reporting out of the factual information is such that it is predictable that future contention will be a consequence (because the information will be unduly connotative rather than denotative and thus open to a variety of interpretations), there is value in resolving the contention at the point of negotiating the need for the measurement or the definition of the measurement, in the first instance, rather than creating the measurement and fighting about what the reported information "means." In this regard, private negotiations are invaluable. Certain proposed "measurements" are taken off the table, and the contention associated with them resolved at an earlier point in time.

The Commission's proposed "guidelines" contain a number of measurements where the contention associated with the "meaning" of the measurement remains high. With respect to certain of the proposed measurements, it is not a matter of whether a carrier can collect the information and provide the data (a matter of fundamental capability), or even whether a carrier is willing to create the measure and report the information (a contractual negotiation matter), but whether the

collection and reporting of the information is appropriate, given the predictable future contention over the significance of the information or its expected use.

A federal formal rulemaking proceeding lacks the necessary flexibility and procedural processes to allow the type of contention addressed above to be resolved at the lowest possible level. State fora, on the other hand, present a better venue for this type of contention resolution. When parties to contract negotiations fail to agree, State regulatory processes generally allow the advocacy of competing parties to be addressed by arbitrators or mediators, both of whom generally allow for a more elaborate testimonial process than the Commission's "written-filing" regime.

In essence, the combination of the contract negotiation/state review process allows for contention about appropriate measurements to be addressed at the basest level and prevents contention from percolating up to a more elaborate regulatory level. Such a model is preferable to one where it is predictable that contention will take the form not just of formal filed written comments but ongoing federal regulatory *ex partes* and complaints about differences of opinion.

Given that choosing one measure over another, or a modification of a measure, or refusing to provide any particular measure at all, cannot be said with any definity to significantly or materially compromise "'efficient and effective communication'" as between the ILEC and the CLEC,[20] carriers should be free to

[20] The Commission states that such communication is a goal of its proposal to establish performance measurements (see id. paras. 9, 10, 14) describing the phrase as meaning the ability "to access the customer data necessary to sign up customers, place an order for services or facilities with the incumbent, track the progress of that order to completion, receive relevant billing information from the incumbent,

negotiate among the many means to the end, leaving to state regulatory authorities the responsibility of addressing those matters that result in impasse in a more real-time, close-to-home (i.e., close to systems and close to business processes) environment.

III. THE ROLE OF THE STATES AND THEIR NEED FOR GUIDANCE.

The intentions expressed in the NPRM make clear a current Commission intention to accommodate ongoing and future State commission initiatives in the area of performance measurements, an accommodation critical not just from a strict jurisdictional analysis but from the perspective of regulatory comity, as well. However, in the NPRM's articulation of the States "requests" to the Commission regarding aid in this area, the Commission combines its lack of deference to the negotiation process with an overstated deference to the States' request for guidance, the latter predicated on a fundamental misconstruction of that request.

A. The NARUC Resolution.

Given the "primacy" of the NARUC Resolution[21] to the institution of the instant NPRM,[22] the contents of that Resolution warrant more analysis than the Commission accorded it. The few sentences quoted by the Commission fail to

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and obtain prompt repair and maintenance for the elements and services it obtains from the incumbent." Id. para. 9.

[21] See NARUC Convention Floor Resolution No. 5, "Operations Support Systems Performance Standards" (adopted by the Exec. Comm. On Nov. 11, 1997) ("NARUC Resolution"), referenced by the Commission in the NPRM at n.3.

[22] The Commission asserts that the "primary goal" of the NPRM "is to provide the . . . guidance" requested by NARUC. NPRM para. 23.

accurately reflect the NARUC Resolution in its "totality."[23]

For a number of reasons, the NARUC resolution does not support the kind of broad, detailed proposed rules/guidance the Commission proposes. For purposes of an analysis of the requested relief and the Commission's response, the substance of NARUC Resolution is as critical for what it did not address or ask regarding requested relief as for what it did address.

First, that resolution was confined to the subject matter of OSSs – one type of UNE. It did not address OS or DA, specifically. Nor did it address interconnection performance measurements or business process measurements.[24]

Second, the NARUC Resolution was crafted as one seeking guidance to better able the States to resolve OSS issues in the context of Section 271 Checklist compliance. It was not a generally-worded resolution dealing with general ILEC interconnection, resale or UNE compliance obligations under Sections 251 or 252. Despite the context of the requested relief, the Commission focuses on Sections 251 and 252, where its jurisdiction is questionable,[25] and provides no illumination on the

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[23] The Commission cites to a "pertinent part" of the NARUC Resolution, which it asserts supports its current proposed "guidance" to the states. Id. para. 22 and n. 15 (stating that the NARUC Resolution "state[d] in pertinent part: RESOLVED: That the FCC be urged to move promptly to advance the establishment of guidelines that can be used to evaluate the provision of access to the components of OSS functions. . . . ."; footnote omitted).

[24] See note 2, supra.

[25] The Commission invites comment on its jurisdiction to promulgate rules establishing performance measurements for OSSs. NPRM para. 25. The Commission notes that a number of parties claim the Commission has no such jurisdiction (id. n.29) and, certainly, the Eighth Circuit opinion establishes the proposition that the Commission could not establish rules under Section 251 that operated generally to preempt a state regulatory authority from behaving to the

role of any Commission-promulgated guidance on Section 271 filings – the specific focus of the NARUC Resolution.

There is a reason that the NARUC Resolution framed its request for Commission guidance on the Section 271 matters. **States do not need guidance with respect to implementation of Sections 251 and 252.** They have primary jurisdiction over privately-negotiated contracts under those sections, and have been exercising such authority through legislatively-endorsed mediation and arbitration authority unencumbered by federal rules regarding performance measurements for quite some time.[26] Furthermore, some states have also initiated performance measurement proceedings addressing matters left unaddressed by contracting parties or which they believe require broader analysis or application.

Third, the NARUC Resolution did not seek the type of rulemaking proceeding the Commission has embarked upon, as an initial approach. Rather, that

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contrary. Iowa Utilities Board, 120 F.3d at 806. Indeed, Commissioner Furchtgott Roth expresses his own concern about the dubious assertion of Commission jurisdiction in this area. Dissenting Statement of Furchtgott-Roth at 2-3.

Interestingly, the Commission postures its jurisdictional analysis around Sections 251 and 252, never addressing in any detail Section 271. This is even more perplexing because, as discussed more fully above, Section 271 matters were what caused the NARUC to seek guidance from the Commission in the first place.

[26] Even if the Commission's jurisdiction to proceed with its proposed guidance (or rules) was not, in the first instance, fraught with disagreement (see note 25, supra), the significant lapse of time between the Commission's issuance of its First Report and Order, and the existence of hundreds of negotiated contracts, many of which have already been through the state mediation/arbitration process without benefit of any formal Commission rules cautions against the establishment of rules at this time. This is particularly the case since such delayed "guidance" would not be binding on any state.

Resolution suggested the establishment of "a negotiated rulemaking" process,[27] along with a direction to industry standards bodies to "work with NARUC and its staff to determine the technical specifications and guidelines needed for developing uniform access to OSS functions by a date certain."[28]

Only "[i]n the event" of failure of the above proposals did the NARUC Resolution call for an FCC proceeding directed toward the development of "performance categories and measurement methodologies for reporting purposes," always leaving to the States "the ability to establish the actual performance benchmarks, or the minimum performance requirements." Yet, the Commission – ignoring the predicate requests for relief outlined in the NARUC Resolution – begins its NPRM at the end.

Clearly, the NARUC Resolution does not support the broad, absolute statement that the "states have sought [the] Commission's help in developing [performance] measurements."[29] Such "help" was identified as necessary only after certain predicate actions which the Commission has totally failed to initiate (i.e., negotiated rulemaking and direction to standards bodies).

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[27] This would involve "interested industry and regulators to develop appropriate performance categories and measurements methodologies for reporting purposes that should be established for documentation in the performance reports."

[28] It is highly questionable that the Commission could grant this requested relief. Nor would U S WEST support it, believing that the industry standards bodies – which generally operate open processes, such that NARUC and its staff are free to participate – are currently pursuing the subject matters of the NARUC Resolution responsibly and professionally.

[29] NPRM para. 4.

IV. THE STRUCTURE OF THE COMMISSION'S PROPOSAL IS FLAWED.

Despite the Commission's protestations that its proposals represent a "common sense approach"[30] to performance measurement issues such is not patently the case. The detail[31] associated with the guidance the Commission offers is totally inconsistent with the notion of "guidance." And, the notion of "guidance" is inconsistent with formal rules. The combination is certain to result in legal challenges, should the Commission determine to proceed under the framework it proposes. For these reasons, the Commission should terminate its current rulemaking initiative.

A. The NPRM Is "Tedious" With Detail.

While the Commission attempts to articulate precisely why it believes the level of detail incorporated in the NPRM is necessary,[32] Commissioner Furchtgott-Roth correctly characterizes the "NPRM [as] tedious with detail."[33] In other contexts in which the Commission has established federal regulatory guidance to

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[30] Id. para. 5. The Commission here is obviously feeding off the rhetoric of its Chairman who has announced that one of the fundamental policies of the Commission with respect to regulatory imperatives is that they be embued with "common sense." See e.g., Statement of William E. Kennard, Confirmation Hearing Before the Commerce, Science, and Transportation Committee, United States Senate, Oct. 1, 1997.

[31] NPRM para. 23 (noting that the Commission's proposal is "based on . . . detailed descriptions" and "describes in detail" the measurements being addressed). And see Dissenting Statement of Furchtgott-Roth at 3 ("There are a total of 30 measures proposed, page upon regulatory page of measures.").

[32] NPRM paras. 36-37.

educate the actions of the states which might – intentionally or inadvertently – tread on a matter of federal regulatory prerogative, the Commission's advice has been reflected in more generally structured "principles,"[34] rather than the extensive detail reflected in the NPRM.[35]

The framework of the NPRM, crafted of necessity (because of the Commission's approach) as broadly-applicable "guidance" for all ILECs cannot possibly replicate the contract negotiation process, where "individuals can obtain the specific terms and conditions to meet their specific needs."[36] And it is clearly the latter approach that best reflects "common sense," given the multiplicity of ways and means by which those needs could be met.

While there is certainly nothing inappropriate in the Commission's providing "guidance" to state commissions or the industry, the promulgation of such guidance should not be so detailed as the proposals outlined in the NPRM nor crafted in the form of "rules." This is particularly the case where the promulgated "rules" can move or change from "guidance" to "legally binding" rules at some undetermined point in the future, theoretically without additional comment or regulatory

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[33] Dissenting Statement of Furchtgott-Roth at 4.

[34] See In the Matter of Telephone Number Portability, CC Docket No. 95-116, RM 8535, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8352, 8378 para. 48 (1996), First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd. 7236, 7247-48 paras. 19-20 (1997), *appeal pending sub nom.* U S WEST, Inc. v. F.C.C., No. 97-9518 (10th Cir. Apr. 24, 1997).

[35] Dissenting Statement of Furchtgott-Roth at 3 ("Surely the proposed list is a broad-ranging shopping list of possible ideas rather than a central core of measures."), 4 ("I am concerned by both the sheer number and the level of detail contained in the proposed performance measures.").

analysis.[37]

B. The Form Of The Commission's Proposal Is Problematic.

The Commission describes its instant NPRM as one communicating "no[n] legally binding" "guidance."[38] However, "guidance" – crafted in the form of proposed "rules" that may or may not be enacted in the future, dependent on fairly broadly-defined future events (i.e., "experience . . . gain[ed] from the development of . . . model performance measures and reporting requirements and their application by the states")[39] is something of an oxymoron.[40] Such guidance should take the form of generally applicable "principles."[41]

Furthermore, the Commission's changing lexicon regarding what is precisely occurring as a result of the current NPRM merely adds to the confusion. Depending on the paragraph being read, the Commission refers to its current proceeding as one where performance measurements are being "propose[d]"[42] to one where the Commission "propose[s] . . . to adopt" certain measurements[43] to one where the Commission intends "to adopt" certain measurements for "prompt implementation"[44] to one where – depending on future state activity – the FCC will "decide whether to

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[36] Id. at 1.

[37] NPRM paras. 23-24.

[38] Id. paras. 4, 23.

[39] Id. para. 3.

[40] See page 6, supra.

[41] See note 34 and accompanying text, supra.

[42] NPRM para. 21.

[43] Id. para. 4.

adopt" certain measurements[45] to "model rules."[46] It is difficult, to say the least, for a reader to grasp the precise intentions around the currently-proposed non-legally binding "guidance."

Moreover, there are substantive and procedural due process issues associated with the Commission's current initiative. As indicated above, there are considerable jurisdictional questions around the establishment of federal performance measurements under Sections 251 and 252.[47] Add to that the Commission's lack of jurisdiction to "add" requirements to the Section 271 checklist, and it becomes increasingly unclear what substantive legal support the Commission has for the promulgation of rules, in the first instance.

Even if the Commission has the jurisdiction to promulgate such rules, however, a rulemaking model which begins with "guidance" and moves perhaps in the future to "binding rules" is problematic. First, the "conditions" that the Commission points to that might cause the conversion are very broadly-defined. Secondly, the fact that the conditions might never be met, or might be met without the knowledge of a large portion of industry participants,[48] strongly suggests that the Commission would need to do something more affirmative in the future to

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[44] Id. para. 23.

[45] Id.

[46] Id. paras. 124, 129.

[47] See note 25, supra.

[48] For example, the Commission might determine that – due to regulatory responses/actions of State Commissions in the southeast – the guidelines need to convert to rules. Much of the industry would have no idea that something "untoward" was occurring in the southeast that might trigger the conversion.